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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-25
77-37
77-42

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York (77-37),

Petitioner,

against

SHIRLEY HERRIOT BROOKS AND GLORIA JONES, et al.,

Respondents.

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc. (77-25),

Petitioners,

against

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated,

Respondents.

WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., and THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK (77-42),

Petitioners,

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SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER LOUIS J. LEFKOWITZ

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Opinions Below

Opinion and order of the District Court (WERKER, D.J.) dismissing the action is reported at 404 F. Supp. 1059 (S.D.N.Y. 1975) (P. 31a).* Opinion of the Court of Ap-

*Numbers in parentheses refer to the Appendix to Petition for Writ of Certiorari (P. a).

peals for the Second Circuit reversing and remanding the complaint is reported at 553 F. 2d 764 (P. 3a). The order granting certiorari and consolidating the cases is dated October 3, 1977 and found at —— U.S. ——, 46 L.W. 3215 (Oct. 4, 1977).

Another opinion and order in the District Court (GURFEIN, D.J.), not the subject of this appeal, is reported at 63 F.R.D. 409 (S.D.N.Y. 1974) (P. 47a).

Jurisdiction

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

Question Presented

Does a warehouseman's exercise of sale to enforce his lien, done in a manner specified by state statute, Uniform Commercial Code (U.C.C.) § 7-210(2), constitute action "under color of state law" within the meaning of 42 U.S.C. § 1983, or state action under the Fourteenth Amendment?

Statute Involved

Uniform Commercial Code (New York)

§ 7-210. Enforcement of Warehouseman's Lien

(1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained

by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

(a) All persons known to claim an interest in the goods must be notified.

(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.

(c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

(d) The sale must conform to the terms of the notification.

(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

(f) After the expiration of the time given in the notification, an advertisement of the sale must be pub-

lished once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held.

The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale.

Statement of the Case

The order (P. 1a) upon which certiorari has been granted reversed an order of the District Court for the Southern District of New York, and remanded the action to the District Court in accordance with the opinion for decision on determination of the class and the constitutionality of § 7-210 of the Uniform Commercial Code. The Court of Appeals itself stayed its mandate (or order) pending certiorari.

Initially respondent Shirley Herriot Brooks, a resident of Westchester County, commenced the action in the District Court by summons and complaint dated September 21, 1973 challenging the warehouseman's lien and power of sale. U.C.C. §§ 7-209, 7-210. Thereafter the Attorney General and the several trade associations moved to intervene as defendants. At the same time the late Gloria Jones moved to intervene as a plaintiff, apparently because the initial plaintiff Brooks' household goods had been returned and Brooks thus no longer had any claim for injunctive relief. All motions were granted, 63 F.R.D. 409 (S.D.N.Y. 1974).

Then the plaintiffs moved for summary judgment and class action determination. Defendants Flagg Brothers,

Inc. and Henry Flagg cross-moved to dismiss. By order and decision of July 5, 1975, the District Court denied plaintiffs' motion(s) and granted defendants' motion, finding a lack of state action and consequently a lack of jurisdiction. 404 F. Supp. 1059 (P. 31a).

Plaintiff Jones paid defendant Flagg Brothers for the return of her goods after this decision. She received the household goods, although she claims not all of them (P. 12a, n. 7).

Plaintiffs took an appeal to the Court of Appeals for the Second Circuit. This was argued in February 1976. While the appeal was *sub judice* appellant (intervenor-plaintiff) Jones died. Later plaintiffs' counsel moved in the Court of Appeals to intervene her estate. This was not opposed and in an opinion dated April 7, 1977 leave was granted to substitute Jones' personal representative. (P. 25a, n. 16.) In the substantive portion of the opinion the majority of the Second Circuit panel reversed and remanded as noted, *supra*. The basis of the reversal was that the "combination of New York's statutory delegation of distinctly governmental power to the warehouseman and its corresponding expansion of his common law remedies suffices to thrust the state's involvement in the challenged activity over the threshold of state action" (P. 17a). The majority consequently held there was "state action" in the warehouseman's exercise of his power of sale of goods on which he had a common law lien. It was held the federal court had jurisdiction. It should be pointed out that the warehouseman's lien, although challenged constitutionally in the complaint and held by the District Court not to be "state action" and part of the subject of the Notice of Appeal to the District Court, was not pressed in the Court of Appeals nor argued by appellants (P. 14a).*

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* In n. 10 (P. 14a) the majority opinion notes "they [appellants] state they wish to preserve this point for possible review

(footnote continued on following page)

The dissenting Judge (HOLDEN, D.J.) (P. 26a *et seq.*) stated that he agreed with the District Court that it was without jurisdiction and would affirm the dismissal of the action. Despite concern with the "plight" of plaintiffs, on the facts alleged the State of New York was not a participant in the "action" taken by defendant Flagg. Judge HOLDEN noted that the defendant retained the bailed property under an ancient common law lien and that while the complaint speaks of threats of sale, the remedy was not applied. The property had been returned to both plaintiffs before the appeal. He failed to find any state involvement in the private dealings between the warehouseman and bailors of stored property. No state agency or official had intervened. By law, since 1879, the enforcement of a warehouseman's lien had not been a function of the sheriff. The statute did not "command" the sale (7-209 and 7-210) as an exclusive remedy. The statutory history indicates an accretion of safeguards. Weighing the variables, the defendant warehouseman's exercise of allowable power was not state action within the Fourteenth Amendment.

After the order of the Circuit Court (P. 1a), the Court stayed its mandate pending the petition for certiorari (Order of May 4, 1977).

Facts

Respondents Brooks and Jones were residents of Mount Vernon, New York at the time they were evicted from their apartments pursuant to court order. The City Mar-

(footnote continued from preceding page)

by the Supreme Court." We wish to note, however, that the petitioners obviously have not raised this as a "question presented" in their petition for certiorari and respondents did not cross-petition, indeed opposing the application for the writ of certiorari which this Court granted. Thus at this time and as the law of the case, the warehouseman's lien is constitutional and not the subject of discussion.

shal* had accomplished the evictions, which resulted in the placement of respondents' household goods on the street. The moving company was not involved in the eviction order. Although there is some dispute, it is admitted that petitioner Flagg Brothers (or an employee) met there with respondents (two different incidents are involved) and took over the goods and stored them pending instructions from respondents. The mover also informed respondents, not surprisingly, that there was a charge for its services. There is some dispute as to the proper charges. Flagg Brothers thus moved the goods and stored them, expending time and labor.

Although some payments were made, in due course Flagg Brothers asserted its lien (U.C.C. § 7-209) by refusing to return the stored property until its charges were met. Respondents asserted that an unnamed employee of Flagg Brothers, never a party to the litigation, "threatened" respondents with sale of the goods. Flagg Brothers never took any statutory steps to proceed with the sale (U.C.C. § 7-210).

Summary of Argument

The passage of U.C.C. § 7-210 does not constitute state action within the Fourteenth Amendment to the United States Constitution. The action "threatened" here, sale of stored property, on which the warehouseman has a lien, is not a traditional function of the State. The mere existence of a statute authorizing the warehouseman's conduct hardly transforms an admittedly private matter into one involving the State of New York. The federal courts lack jurisdiction over the complaint.

A finding of state action cannot be based on the "fact" that by enacting the statute, New York (and 48 other states

* Originally named a party but discontinued as against him.

plus the District of Columbia) gave an uniquely governmental power to the warehouseman. It is grossly improper to analogize a sheriff's power (to seize property to execute a judgment) to the limited power of the warehouseman. The warehouseman's sale had never been a governmental function. It is a reasonable corollary of the lien and derived from it.

To advance a claim of affirmative state support to the warehouseman there must be a showing that the statute and its authorization of non-judicial sale were in direct contravention of a goal of the Fourteenth Amendment. Absent any racially discriminatory motivation in U.C.C. § 7-210, it is not a violation of any constitutional safeguard by the State of New York.

To hold otherwise and affirm the order below would subject nearly all private activity to the application of the Fourteenth Amendment and render the valuable requirement of state action meaningless.

Although not an issue now, U.C.C. § 7-210 provides notice and an *opportunity* to be heard, the hallmarks of due process which do not apply, at this time, to the case. A finding of unconstitutionality, if it were an issue, would have many undesirable effects upon both the warehouseman and his customer.

POINT I

The existence of U.C.C. § 7-210 does not constitute state action to bring the complaint within the jurisdiction of the Federal Courts.

The action of the New York State Legislature in enacting the Uniform Commercial Code should not be converted, as it was by the Court of Appeals, into state action bringing the complaint within federal jurisdiction, 42 U.S.C. § 1983, 28 U.S.C. § 1343. To do so was erroneous. In the first place, the petitioner moving company never invoked

its right of sale pursuant to U.C.C. § 7-210. It never took the steps necessary under § 7-210(2), the applicable section covering non-business stored goods, to hold a sale. The only operative facts herein were that respondents' goods were subject to the warehouseman's lien and retained thereunder. The lien not being in issue before this Court, the retention was undoubtedly legal and presumably constitutional.* Thus non-judicial sale (§ 7-210) did not injure respondents as it was not exercised and the household goods have long since been returned.**

In the second place, assuming that respondents have standing or a real case or controversy, it is not a matter of dispute that there must be state action before the District Court has jurisdiction of the complaint. It is a basic premise in cases of this type (P. 7a, 34a). This requirement follows from the Fourteenth Amendment, Sec. 1 (in pertinent part):

> ". . . No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *State* deprive *any* person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis supplied).

In other words, the Amendment applies only to States, not to private conduct. This is made quite clear by the latest decision of this Court as to the scope and meaning of

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* If, as respondents seems to argue by now only challenging the sale provision and not the lien, the moving company simply invoked the lien, U.C.C. § 7-209, and never utilized § 7-210, they would have a tenable state claim. *Morgan* v. *Murtha,* 18 Misc. 438, 42 N.Y.S. 374 (App. T., 1896).

** This raises an issue of standing and justiciability, as a matter of the case or controversy requirement associated with Art. III of the Constitution. The issue need not be raised by a party in its petition for certiorari—the Court must examine the issue. *Juidice* v. *Vail,* 430 U.S. 327, 331-333 (1977).

state action. In *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), it was held that termination of electric service by a utility company was not "state action". *Jackson* spoke (at 349) of the essential dichotomy in the 14th Amendment between deprivation by the State, subject to scrutiny, and private conduct, however discriminatory or wrongful, against which the Amendment provides no shield, citing the *Civil Rights Cases*, 109 U.S. 3 (1883), and *Shelley* v. *Kramer*, 334 U.S. 1 (1948).

This distinction, even in racial discrimination cases, obviously not the case here, has been maintained. See *Evans* v. *Abney*, 396 U.S. 435 (1970), and *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972).

In a transparent effort to avoid the clear meaning of the *Jackson* decision, the majority of the court below seized upon this language in *Jackson*, at 353:

> "If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one."

Note that this Court did not say it would find state action in a delegation of power, such as eminent domain case, only that it was a "different case". This is far different even from dicta that a delegation of power constituted state action. Also the decision below ignores the numerous examples of traditional functions of the State, where private exercise of power was found to be state action. They are so far removed from the private relations involved here to amply demonstrate the erroneousness of the decision below. See, *e.g.*, the cases cited in *Jackson* at 352.

Nixon v. *Condon*, 286 U.S. 73 (1932)—an election case involving racial discrimination;

Terry v. *Adams*, 345 U.S. 461 (1953)—an election case involving racial discrimination;

Marsh v. *Adams*, 326 U.S. 501 (1946)—a free speech case involving a company town;

Evans v. *Newton*, 382 U.S. 296 (1966)—a racial discrimination case involving a traditionally public park.

The sequel to *Evans* v. *Newton, supra*, is *Evans* v. *Abney, supra* (396 U.S. 435), which, as noted, found no state action and indicates that even in cases where there is a racial issue, there are limits to finding state action.

The court below did not find itself deterred from finding state action in U.C.C. § 7-210. It concluded that the passage by the New York legislature of U.C.C. § 7-210, derived from an 1879 statute, was a delegation of a distinctly governmental power and expansion of common law remedies. Besides not being supported by any decisions of this Court (the opinion fails to cite any), the holding is not even arguably supported by any authority in its own Circuit. It only cites dissents (18a) and state court decisions (P. 18a, n. 11) which are inapplicable. Thus it cites *Blye* v. *Globe-Wernicke Realty Co.*, 33 NY 2d 15, 347 N.Y.S. 2d 170 (1973), which involved only the hotel's imposition of a lien by seizing baggage, not the subsequent sale.* *Sharrock* v. *Dell Buick Cadillac Corp.*, 56 A D 2d 446, 393 N.Y.S. 2d 166 (2d Dept. 1977), a garageman's lien case, is presently on appeal to the New York Court of Appeals by virtue of a grant of leave to appeal.

In addition, the dissent below, which notes that for nearly a century warehousemen in New York have had the authority to sell goods stored with them to satisfy delinquent charges, also notes the statute does not "command" that § 7-210 be used. The warehouseman's sale cannot properly be compared to a sheriff's sale. While the warehouseman

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* Although *Blye* may be the law of the New York courts, it hardly is an acceptable or correct exposition of the law here. See *Davis* v. *Richmond*, 512 F.2d 201, 203 (1st Cir. 1975); *Anastasia* v. *Cosmopolitan Nat. Bank*, 527 F.2d 1250 (7th Cir. 1975), *cert. denied*, 424 U.S. 928.

may bring an action and use a sherff to execute the lien, the sheriff has a role and power which readily distinguishes him from a warehouseman. The sheriff can and usually does seize the property from the debtor which he then sells to satisfy the execution. This is his traditional role—the exercise of force, a traditional state power—over the debtor. In obvious contrast, the warehouseman does not have this power—he cannot use force—and the state has not delegated it to him. As the dissent cogently notes (P. 29a), "there has been an accretion of safeguards to the mutual benefit of the parties to the bailment."

Although the majority opinion cites R. Brown, *The Law of Personal Property,* § 108, at 519, § 119, at 588-89 (2 ed. 1955) (P. 19a), for the proposition that at common law the warehouseman could not sell the goods and apply the proceeds to the debt, it fails to note the complete situation. At common law, equity would not issue a decree for the power of sale. R. Brown, *supra,* § 119, at 590 citing *Thames Iron Works* v. *Patent Derrick Co.,* J & H (Ch.) 93 (1860), where it was noted that retention under the lien caused continuous expense but there was no precedent for a bill authorizing sale. The text comments:

> "The situation presented is obviously very undesirable. The goods, on which the lien is claimed, are, contrary to the usual policy of the law, withdrawn from all commercial transactions. They stand idle, of no use to their owner, the lienor, or society. Accordingly, in practically all states, statutes of greater or less general application are found which confer on the lienor the power of enforcing the lien either by sale of the chattel in question under suitable restrictions or by court proceedings against the owner of the encumbered property culminating in a judgment for the sale of the chattel to satisfy the lien claimed upon."*

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* Cited as an example was the New York Lien Law, §§ 200-210.

So long as the lien is valid, which it is, the option of non-judicial sale is a reasonable choice, setting forth a compromise of the property interests of the lienor and lienee. It properly recognizes the traditional right of a private party to alienate or sell property in his possession. While the state may and does regulate property, the right to dispose of it is one of the essential incidents of property. 63 Am. Jur. 2d, *Property,* §§ 2 *et seq.* Thus the warehouseman may sell the stored property in which he has an undeniable property interest by virtue of the lien but he must observe the statute, designed to protect the storer of household property. Any violation of the statute renders the warehouseman liable for damages, an entirely adequate remedy in the case of personal property. *Cf. Bankers Commercial Corp.* v. *Mittleman,* 21 Misc. 2d 1096, 198 N.Y.S. 2d 184 (Sup. Ct., N.Y. Co. 1960); *Hartford Ins. Co.* v. *Albertson,* 59 Misc. 2d 207, 298 N.Y.S. 2d 321 (Co. Ct., Westchester Co., 1969). The reasonableness of the statutory scheme has been noted and approved in another context (garageman's lien) in *Phillips* v. *Money,* 503 F. 2d 990, 994-995 (7th Cir. 1974), cert. den. 420 U.S. 934.

The determination below, besides containing a cogent dissent, admittedly is in direct conflict with *Melara* v. *Kennedy,* 541 F. 2d 802 (9th Cir. 1976). That decision, involving precisely the same Uniform Commercial Code provision as here, declined to find state action in the proposed sale of stored goods. It analyzed all the factors of which only two, Source of Authority, *id.* at 805, and Delegation of State Function, *id.* at 807-808, need be mentioned, since these are the only two reasons the opinion below found to give state action. As *Melara* notes, even though private enforcement of the lien was unknown at common law, this is not determinative of state action. This lack of common law origin is a factor of dubious worth *Melara* notes citing *Culbertson* v. *Leland,* 528 F. 2d 426 (9th Cir. 1975) where, with a dissent, the same court found state action in a landlady summarily seizing, as security for unpaid rent, an evicted tenant's household

goods pursuant to a state statute. In *Melara,* the challenged statute's age (120 years) was cited, and there was no claim that it was enacted so that the state could avoid its constitutional obligations. The statute created only the right to act and did not require such action to be taken. Citing *Jackson* v. *Metropolitan Edison, supra,* 419 U.S. at 357, it was said the moving company's "exercise of the choice allowed by state law where the initiative comes from [him] and not from the State, does not make [his] actions in doing so 'state action' for the purposes of the Fourteenth Amendment."

The second consideration, delegation of state function, was the last discussed by *Melara,* at 807-809. This theory of state action was not based on any decision of this Court but rather on *Hall* v. *Garson,* 430 F. 2d 430 (5th Cir. 1970), which *Melara* noted had never been accepted by the 9th Circuit.* *Hall* involved summary seizure—a function traditionally reserved to the state—and also there was no relationship between the property seized and the underlying debt. The landlord was granted by statute a roving commission. The warehouseman is in a vastly different position. The challenged action, non-judicial sale, required no seizure; and the property to be sold by the warehouseman is the basis of the underlying debt. Also cited was *Melara's* notice of the lien enforcement remedy.** For

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* Apparently it has not been accepted by the Second Circuit, although relied on, at least in the opinion below. Distinguishing *Bond* v. *Dentzer,* 494 F. 2d 302 (2d Cir.), *cert. den.* 419 U.S. 837 and *Shirley* v. *State National Bank of Conn.,* 493 F. 2d 739 (2d Cir. 1974), *cert. den.* 419 U.S. 1009 (1974), the opinion below relied on *Tedeschi* v. *Blackwood,* 410 F. Supp. 34 (D. Conn. 1976) which involved a statute empowering a police officer or motor vehicle inspector to impose a lien on an "abandoned" vehicle by towing it to a garage. *Tedeschi* obviously involved seizure by State officials and for that reason is distinguishable from the instant case or *Melara.*

** This was claimed below by Flagg Brothers but summarily rejected by the opinion (P. 9a, n. 3). Normally a bill of lading is given with the storage contract. Brooks' and Jones' cases had emergency factors, since the goods were on the street, literally following an eviction, not in issue here.

these reasons no state action was found by the *Melara* decision and correctly so, we submit.

We are aware that shortly after the case below was decided, the Eighth Circuit handed down *Cox Bakeries of N.D.* v. *Timm Moving and Storage,* 554 F. 2d 356 (8th Cir. 1977), involving a warehouseman's lien sale. It found state action. Besides citing the opinion below, the court seemed to rely on Justice BRENNAN's concurrence (and dissent in part) in *Adickes* v. *Kress & Co.,* 398 U.S. 144, 188, at 203 (1970), and the opinion in *Reitman* v. *Mulkey,* 387 U.S. 369 (1967). Also noted was the age of the practice in California as recited in *Melara.* The statute in *Cox* was cited as N.D. Cent. Code § 41-07-16 and was said to date from 1967. This is the North Dakota Uniform Commercial Code, Pocket Part, p. 7 to 3 Uniform Commercial Code (U.C.C.), Uniform Laws Annotated. The U.C.C. (and this law in North Dakota) does have more ancient sources.

Cox is a particularly deficient decision because of its reliance on the concurrence in *Adickes* and the *Reitman* opinion. Both cases involve racial discrimination, at the heart of the purpose of the 14th Amendment. *Reitman* was based on state involvement through the passage of legislation which "encourages" an activity previously forbidden. *Melara* presumably failed to consider this a viable theory with respect to private creditor remedies.*

Outside the area of racial discrimination, the significance of the remedy under challenge being statutory and not com-

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* *Reitman* had already been distinguished by the Ninth Circuit because it concerned racial discrimination and "because the proposition approved there had been initiated for the purpose of authorizing what had before been expressly prohibited". *Adams* v. *Southern California First Nat'l Bank,* 492 F. 2d 324, 332 (9th Cir. 1974), *cert. den.* 419 U.S. 1006 (1974).

In contrast, Gilmore, 2 *Security Interests in Personal Property* [Little, Brown & Co. 1954], § 44.6 at 1238, notes "the sale of collateral (without a court order) is, always has been, and always will be the normal default procedure".

mon law concededly is not dispositive of the state action inquiry. *Cox* demonstrates the absurdity of using age as the test. To quote Burke and Reber, *State Action Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment,* 47 S. Cal. L. Rev. 1, 47 (1973):

> "The fact that the law under attack is new and creates, rather than codifies, common law rights should not change the inquiry. The focus for state action purposes should always be on the impact of the law upon private ordering, not the law's age or historical underpinnings. Unless the law in some fashion significantly interferes with private ordering, the challenged conduct should not be attributed to the state. To make state action turn upon whether the statutory right being asserted has common law origins would lead to anomalous results. The identical private conduct pursuant to the identical state statutory or judicial law, would be state action in some states while not in others depending solely upon the fortuitous and unimportant circumstances of the age and history of the law."

The opinion below also quotes and agrees with this quotation, disputing only the author's conclusion. The opinion's conclusion that § 7-210 has a significant impact on "private ordering", however, we strongly urge, is erroneous. The assertion is based on an assumption the warehouseman is placed in a different position than any other creditor by the statute. In fact the warehouseman is in a different position because of his lien, U.C.C. § 7-209, which is not the subject of this case. The statute does not affect this at all. Unlike the usual creditor, the warehouseman already has possession of his security and has an undisputable property interest in same by virtue of his lien. In that regard many other businessmen are in the same position. N.Y. Lien Law §§ 200-210.

To condemn circumvention of the judicial process by nonjudicial sale is to place that process on an unwarranted pedestal. Even if the statute required institution of a suit before sale, this is no guarantee of a full hearing. The respondents herein would still have to avail themselves of the opportunity for a hearing, something they could have had in the instant action, by pleading a pendant state cause of action. On the other hand, the statute does not prohibit a hearing before or after sale. Once again, as the dissent herein aptly notes (28a-29a), no state official commanded use of § 7-210. The lack of state action is obvious.

Messrs. Burke and Reber, in a series of articles, 46 S. Cal. L. Rev. 1003 (1973) and 47 S. Cal. L. Rev. 1 (1973), *supra,* comprehensively review the requirement of state action and its application to the warehouseman's lien, among others. Uniformly, they reject an expansive reading of state action in the debtor-creditor relations. In 47 S. Cal. L. Rev., at 53, they note that decisions on state action preserve the historical role assigned the 14th Amendment and the institutional values inherent in the state action limitation on the reach of the Amendment. The opinion below fails to do so. The intent of the Amendment was to place a buffer between people and the government, not between debtors and creditors. See also 10 Loyola L. Rev. 465 (1977).

The assertion of the opinion below as to the altering of the "balance of power" between debtor and creditor by the statute and its predecessors (P. 21a) ignores the historic role that the states have played in defining and protecting property rights. *Katz* v. *United States,* 389 U.S. 347, 350-351 (1967) (general right to privacy):

> "But the protection of a person's general right to privacy . . . is like the protection of his property and of his very life, left largely to the law of the individual States." (n. omitted).

POINT II

U.C.C. § 7-210, regardless of state action, affords adequate due process.

Although the ultimate constitutional validity of U.C.C. § 7-210 is not a question on which certiorari has been granted, this Court should be reminded that due process is not violated even if there were state action and a continuing threat of its use. (The return of the goods totally eliminates this threat.)

Traditionally, due process requires a notice and an *opportunity* to be heard. *Mullane* v. *Central Hanover Trust Co.,* 339 U.S. 306, 314 (1950). Section 7-210 clearly provides and requires notice. U.C.C. § 7-210(2)(a), (b), (c). It also provides a reasonable time for those concerned to make their appearance—the opportunity to be heard. U.C.C. § 7-210(2)(d), (e), (f) and (3). While the appearance normally discussed is in court, the statute is not defective for not requiring a court proceeding. *Anderson National Bank* v. *Luckett,* 321 U.S. 233 (1944). The time provided by § 7-210(2) after notice and before sale (25 days) is ample. *Goodrich* v. *Ferris,* 214 U.S. 71 (1909) (10 days notice sufficient).

The scope of possibilities are broad during this period or afterwards. *Dininny* v. *Reavis,* 100 Misc. 316 (Sup. Ct., N.Y. Co., 1915), affd. 178 App. Div. 922, 165 N.Y.S. 97 (1st Dept. 1917), is in point.* The plaintiff there contended that Lien Law § 200 allowing public sale of a car to satisfy a lien for storage was unconstitutional because it provided no opportunity for a hearing in case the owner disputed the amount of the lien. Therefore, he said, there was a

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* We are aware *Sharrock* v. *Dell Buick-Cadillac,* 56 A D 2d 446, 393 N.Y.S. 2d 166 (2d Dept. 1971), *supra* is to the contrary. We are appealing *Sharrock* and rest on the correctness of *Dininny,* despite its age.

taking of property without due process. This is the same issue as the respondents present in the instant complaint. *Dininny* states that the amount of the lien is the "sum due" from the owner, not the sum claimed by the lienor. The latter has no protection if he makes a wrongful claim. If he demands more than is actually due, he is liable for conversion and must pay damages. The owner of the goods may dispute the sum and the law provides many remedies. To quote *Dininny,* 100 Misc. at 317-318:

> "He [the owner] can tender the amount, if any, which he claims that he owes and replevy the property from the possession of the lienor if he then refuses to surrender it. He can pay the amount claimed by the lienor and recover back any excess over what was actually due as money paid under duress. If the property is illegally threatened with sale, he can enjoin the sale and determine in the injunction suit what the proper amount of the lien is. He can let the sale proceed and sue all parties concerned for the conversion of his property."

In the present case the respondents' past difficulties were not in the absence of due process but in the failure to plead a cause of action which would entitle them to any relief before the sale. It is undisputed that the household goods were delivered for moving and storage. The duration of the storage became open-ended. While respondents suggest no consent to store (a state defense) and that the amount of the lien may be excessive, the fact also undisputed is that they made no reasonable tender to the warehouse until the action was dismissed in the District Court.

The right of the warehouse to effect the sale to satisfy the lien cannot be defeated due to the refusal or inability to pay the proper amount of the lien any more than the pawnbroker or the banker with whom stock or other securities have been pledged for a loan can have their rights

defeated. Indeed, in each of these instances unless a convenient and relatively speedy method of satisfying the lien was provided for, the particular type of business transactions would be substantially hampered. In the case of the warehouseman particularly, any such restriction as implicit in state action finding and rigorous application of due process would have a contrary deleterious effect to such persons as respondents, since it would inevitably result in the warehouse insisting on substantial payment in advance, even for preliminary moving and storage.

Specifically as to the warehouseman's lien, see *Magro* v. *Lentini Bros Moving and Storage,* 338 F. Supp. 464 (E.D.N.Y. 1971), affd. 460 F. 2d 1064 (2d Cir. 1972), cert. den. 406 U.S, 961 (1972), which is still valid as to the constitutionality of non-judicial sale via U.C.C. § 7-210. While the concurring decision (TIMBERS, J.) in *Hernandez* v. *European Auto Collision,* 487 F. 2d 378, at 383 *et seq.* (2d Cir. 1973) thought otherwise, this was before the limitation of *Fuentes* v. *Shevin,* 407 U.S. 67 (1972) contained in *Mitchell* v. *W.T. Grant Co.,* 416 U.S. 600 (1974).* *Hernandez* was also recognized by the opinion below not to be binding precedent due to its ignoring of state action (P. 25a).

This Court in *Lindsey* v. *Normet,* 405 U.S. 56 (1972), on a due process challenge to the Oregon Forcible Entry and Wrongful Detainer Statute, a landlord-tenant situation, made the cogent statement, at 74: "But the Constitution does not provide judicial remedies for every social and economic ill". It was there noted by this Court that the landlord had a constitutional right not to have his property or income confiscated.

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* The application of *Sniadach* v. *Family Finance,* 395 U.S. 337 (1969), including *Fuentes* and *Mitchell* plus *North Georgia Finishing Co.* v. *Di-Chem Inc.,* 419 U.S. 601 (1975) to the instant case is misplaced. All involve public officials and court ordered pre-judgment *seizures.* This clearly is not the case herein. State action was not an issue in the above cases.

To paraphrase *Lindsey* (405 U.S. at 74-75), the Constitution has not federalized the substantive law of warehouseman-customer relations. Judicial hearings are not required where there is proper notice. *Anderson National Bank* v. *Luckett, supra,* 321 U.S. 233 (1944); *North Laramie Land Co.* v. *Hoffman,* 268 U.S. 276, 283 (1925); *Huling* v. *Kaw Valley Co.,* 130 U.S. 559, 563-564 (1889); *Ballard* v. *Hunter,* 204 U.S. 241, 254-257, 262 (1907).

In sum, U.C.C. § 7-210 would not be subject to successful challenge on the ground of lack of procedural due process if that question were before the Court. While providing the warehouseman with a relatively speedy and economical method of disposing of moved and stored goods to satisfy the lien, it provides adequate means to the owner of the property to assert any objection thereto by instituting judicial action. *Dininny* v. *Reavis, supra; Lindsey* v. *Normet, supra,* 405 U.S. at 66. This must be preceded by adequate notice, here at least 25 days, so that a fair opportunity is accorded to mount judicial action prior to the sale. A prior *mandated* judicial hearing, apparently contended for by counsel for plaintiff and contemplated by the opinion below, is plainly not requisite. Whether the warehouseman serves a court summons or a sale notice, the storer still has to answer if he desires to challenge the lien. To paraphrase the District Court in *Magro,* keeping all these circumstances and possible legislative justifications in mind, there is no rational challenge to the procedure outlined in U.C.C. § 7-210 on due process grounds.

As in *Mitchell, supra* at 611-612, possession of the goods of the debtor is involved, not in issue here, and postponement of judicial inquiry, as to amount of the lien, is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate. Respondents herein could long ago have received a determination of the validity and amount of the lien, if they so chose. And unlike *Mitchell,* "seizure," the basis of state action, is

not at issue. Respondents had no right to possession of the stored goods absent payment or some security. They concede this by not contesting the lien, § 7-209, in the court below.

The fairness of placing the burden on respondents to initiate the legal challenge to the liens,* contrary to the concurring opinion in *Hernandez, supra,* 487 F. 2d 378, 383 *et seq.* has been recognized in *Phillips* v. *Money,* 503 F. 2d 990, *supra,* where the Seventh Circuit said (at 994-995):

> "In contrast here the voluntary surrender of the motor vehicle to the garageman, albeit for the limited purpose of performing authorized repairs, results in the garageman having both a legal property interest, in the form of a lien, and actual possession. Interference with the *status quo* would be necessary to enable the owner to regain possession prior to final judgment. Under these circumstances we cannot conclude that the Indiana procedure, permitting the repairman to retain possession and imposing on the car owner the burden of initiating litigation to challenge his right and resolve the disputes is fundamentally unfair. See *Hernandez* v. *European Auto Collision, Inc.,* 346 F. Supp. 313, 318-319 (E.D.N.Y. 1972), revd. 487 F. 2d 378 (2d Cir. 1973); *Adams* v. *Dept. of Motor Vehicles, supra.*"

Also relevant is the question of the worth of due process herein. See White, *The Abolition of Self-Help Repossession: The Poor Pay Even More,* 1973 Wisc. Law Rev. 503, at 504 which states the application of *Fuentes* v. *Shevin, supra,* to self-help repossession (similar to the warehouseman's lien situation) "is certainly undesirable and would

* Who must initiate judicial action is not determinative. Access to the court cannot be conditioned on ability to pay for costs. *Magro, supra* at 468, n. 9 citing *Boddie* v. *Connecticut,* 401 U.S. 371 (1971).

constitute due process gone berserk." The conclusion is also instructive (530-531):

> "In our demands for more and greater due process we lawyers have sometimes behaved like engineers gone berserk. Just as an engineer or an architect commissioned to do a job must be reined in and made to consider the costs, so the lawyer and judge must be made to measure the costs to society of these additional due process requirements. Moreover the lawyers and judges role is a more subtle one than the architects, for due process, unlike a new building, is nothing in and of itself. It has value only to the extent that it produces sounder and better results".

It is rather obvious that abolition of non-judicial sale will give no real benefit to the debtor but severely harm the creditor. Thus the creditor could still exercise his possessory lien indefinitely,* depriving the debtor of any benefit, but not be able to efficiently obtain compensation for his labor. A loss results to the debtor without any gain accruing to the creditor.

* State law now prohibits this. *Morgan* v. *Murtha, supra,* 18 Misc. 488, 42 N.Y.S. 374 (App T. 1896).

CONCLUSION

The judgment below should be reversed.

Dated: New York, New York
November 14, 1977

Respectfully submitted,

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